

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRYSON TYLER LOKKEN,

Case No. 3:13-cv-00608-MMD-WGC

Petitioner,

ORDER

v.

ROBERT LeGRAND,

Respondents.

Before the Court for decision is a habeas corpus petition under 28 U.S.C. § 2254 brought by Bryson Tyler Lokken, a Nevada prisoner.

I. PROCEDURAL BACKGROUND¹

Lokken seeks habeas relief from a judgment of conviction entered in the Second Judicial District Court in Washoe County, Nevada. On January 31, 2007, a jury found Lokken guilty of two counts of sexual assault on a child and one count of lewdness with a child under the age of fourteen years. The jury found Lokken not guilty on a charge of false imprisonment. After a sentencing hearing on March 2, 2007, the state district court sentenced Lokken to terms of life imprisonment with the possibility of parole after twenty years on the sexual assault counts and life imprisonment with the possibility of parole after ten years on the lewdness count, all terms to be served concurrently.

Lokken filed a direct appeal. On June 4, 2008, the Nevada Supreme Court entered an order affirming the judgment of conviction. Lokken filed, on May 23, 2009, a

¹This procedural background is derived from the exhibits provided by the respondents at ECF Nos. 9 through 19 and this Court's own docket.

1 proper person petition for writ of habeas corpus in the state district court. After
2 appointment of counsel, Lokken filed a supplemental petition on November 20, 2009.

3 The state district court held an evidentiary hearing on the petition on December
4 12-13, 2011. Lokken also filed motions for a new trial on October 27, 2011, and January
5 28, 2012, which were denied. On May 9, 2012, the state district court entered an order
6 denying habeas relief.

7 On July 25, 2012, the Nevada Supreme Court affirmed the state district court's
8 denial of Lokken's motion for a new trial. On October 16, 2013, the Nevada Supreme
9 Court affirmed the state district court's denial of Lokken's petition for habeas relief.

10 On November 4, 2013, this Court received Lokken's federal petition for a writ of
11 habeas corpus containing four claims. Pursuant to respondents' motion to dismiss, this
12 Court determined that portions of Grounds 1, 2, and 4 were unexhausted. Lokken
13 abandoned those claims.

14 The remaining claims are before the Court for a decision on the merits.

15 **II. STANDARDS OF REVIEW**

16 This action is governed by the Antiterrorism and Effective Death Penalty Act
17 (AEDPA). 28 U.S.C. § 2254(d) sets forth the standard of review under AEDPA:

18 An application for a writ of habeas corpus on behalf of a person in
19 custody pursuant to the judgment of a State court shall not be granted with
20 respect to any claim that was adjudicated on the merits in State court
proceedings unless the adjudication of the claim —

21 (1) resulted in a decision that was contrary to, or involved an
22 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

23 (2) resulted in a decision that was based on an unreasonable
24 determination of the facts in light of the evidence presented in the State
court proceeding.

25 28 U.S.C. § 2254(d).

26 A decision of a state court is "contrary to" clearly established federal law if the
27 state court arrives at a conclusion opposite that reached by the Supreme Court on a
28 question of law or if the state court decides a case differently than the Supreme Court

1 has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–
2 06 (2000). An “unreasonable application” occurs when “a state-court decision
3 unreasonably applies the law of [the Supreme Court] to the facts of a prisoner’s case.”
4 *Id.* at 409. “[A] federal habeas court may not “issue the writ simply because that court
5 concludes in its independent judgment that the relevant state-court decision applied
6 clearly established federal law erroneously or incorrectly.” *Id.* at 411.

7 The Supreme Court has explained that “[a] federal court’s collateral review of a
8 state-court decision must be consistent with the respect due state courts in our federal
9 system.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a
10 ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-
11 court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773
12 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997); *Woodford v. Viscotti*,
13 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination that a claim lacks
14 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on
15 the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101
16 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court
17 has emphasized “that even a strong case for relief does not mean the state court’s
18 contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75
19 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA
20 standard as “a difficult to meet and highly deferential standard for evaluating state-court
21 rulings, which demands that state-court decisions be given the benefit of the doubt”)
22 (internal quotation marks and citations omitted).

23 “[A] federal court may not second-guess a state court’s fact-finding process
24 unless, after review of the state-court record, it determines that the state court was not
25 merely wrong, but actually unreasonable.” *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.
26 2004); see also *Miller-El*, 537 U.S. at 340 (“[A] decision adjudicated on the merits in a
27 state court and based on a factual determination will not be overturned on factual
28 grounds unless objectively unreasonable in light of the evidence presented in the state-

1 court proceeding, § 2254(d)(2).”). Because *de novo* review is more favorable to the
2 petitioner, federal courts can deny writs of habeas corpus under § 2254 by engaging in
3 *de novo* review rather than applying the deferential AEDPA standard. *Berghuis v.*
4 *Thompkins*, 560 U.S. 370, 390 (2010).

5 **III. DISCUSSION**

6 **A. Ground 1**

7 In Ground 1, Lokken alleges that he received ineffective assistance of counsel,
8 in violation of his constitutional rights, due to trial counsel’s failure to investigate certain
9 witnesses who would have supported his claim that the intercourse with the victim was
10 consensual. In particular, Lokken identifies Thomas and Tamara McMahon and Jaclyn
11 Runde as additional witnesses counsel should have investigated and presented to
12 corroborate the testimony of defense witnesses presented at trial. He also alleges
13 ineffective assistance due to counsel’s failure to call an expert witness to challenge the
14 findings of Denise Engel, a nurse who examined the victim after the alleged sexual
15 assault and testified for the State at trial. (ECF No. 10-5.)

16 Ineffective assistance of counsel claims are governed by *Strickland v.*
17 *Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs
18 to obtain habeas relief — deficient performance by counsel and prejudice. 466 U.S. at
19 687. To meet the performance prong, a petitioner must demonstrate that his counsel’s
20 performance was so deficient that it fell below an “objective standard of
21 reasonableness.” *Id.* at 688. As to the prejudice prong, the court “must ask if the
22 defendant has met the burden of showing that the decision reached would reasonably
23 likely have been different absent [counsel’s] errors.” *Strickland*, 466 U.S. at 696. Put
24 another way, a habeas petitioner “must show that there is a reasonable probability that,
25 but for counsel’s unprofessional errors, the result of the proceeding would have been
26 different.” *Id.* at 694.

27 To support its consent theory, the defense presented witnesses at trial who
28 testified about the victim’s statements and conduct after Lokken and the victim had

1 intercourse. (ECF Nos. 10-6 and 10-7.) At Lokken's post-conviction evidentiary hearing,
2 some of these witnesses testified again, but Lokken also called several other witnesses
3 to provide additional testimony on the subject, including the witnesses mentioned above.
4 (ECF Nos. 16-10 and 16-14.)

5 In denying relief, the state district court stated:

6 [P]etitioner alleges his counsel was ineffective for failing to
7 investigate and present certain witnesses who could have exculpated the
8 petitioner. Petitioner presented some of these witnesses or the substance
9 of their testimony through other witnesses at trial. Thus, petitioner failed to
show his counsel was deficient or that petitioner suffered prejudice to such
an extent that the outcome of the trial would have been different had the
additional witnesses been presented.

10 Moreover, the additional witnesses petitioner called at the
11 evidentiary hearing, including petitioner himself, actually weakened
12 petitioner's case. The witnesses contradicted one another about how long
13 the victim and petitioner were together, the type of sexual activity petitioner
and the victim engaged in, who was present outside of petitioner's home
after the crime occurred, and whether the door of petitioner's bedroom was
open or closed during the crime. Accordingly, the court denies the claim.

14 (ECF No. 17-19 at 5.)²

15 On appeal, the Nevada Supreme Court held as follows:

16 [A]ppellant claims that trial counsel was ineffective for failing to
17 thoroughly investigate witnesses who were called at trial and other
18 witnesses who were not called at trial. Appellant failed to demonstrate that
19 he was prejudiced. After the evidentiary hearing, the district court
20 concluded that the additional information that appellant wanted trial
21 counsel to present through the witnesses was information that was already
22 presented at trial through other witnesses and that the information was
23 merely cumulative. Further the district court concluded that these
witnesses may have weakened appellant's case because the witnesses
contradicted each other regarding how long the victim and appellant were
together, the type of sexual activity engaged in, who was present outside
the home of the appellant after the crime occurred, when the crime
occurred, and whether the door of appellant's bedroom was open or
closed. Substantial evidence supports the decision of the district court, and
therefore, the district court did not err in denying this claim.

24 (ECF No. 19-25 at 4-5.)

25 The Nevada Supreme Court applied the correct federal law standard. In addition,
26 fair-minded jurists could conclude that the court reached the right decision in

27 ²Citations to page numbers for documents on this Court's electronic docket are
28 based on CM/ECF pagination.

1 determining that Lokken was not deprived of effective assistance of counsel as a result
2 of counsel failing to investigate or present the designated witnesses.

3 In support of his claim that counsel was ineffective in failing to present an expert
4 witness to challenge the testimony of Nurse Engel, Lokken presented the testimony of
5 Dr. Joyce Adams at his post-conviction evidentiary hearing. (ECF No. 16-9.) Dr. Adams
6 is a pediatrician with an expertise in sexual abuse medical evaluation. (*Id.* at 5).

7 In denying relief, the state district court stated:

8 At the evidentiary hearing, petitioner presented Dr. Joyce Adams
9 as an expert in support of the claim that counsel failed to present an expert
10 to rebut Nurse Engel's testimony. Dr. Adams took issue with Nurse Engel's
11 findings that the victim suffered physical trauma from the rape. But Dr.
12 Adams conceded that the absence of injury in sexual assault cases is just
13 as likely as the presence of injury. Accordingly, Dr. Adam's testimony
14 would not have made a material difference in the outcome of the trial.
15 Furthermore, petitioner was unable to prove that it was unreasonable for
16 a criminal defense lawyer practicing in Nevada at the time of the trial not
17 to consult an expert like Dr. Adams in a case like this. Petitioner's expert,
18 Don Evans, Esq., was unable to testify that the prevailing professional
19 norm in cases like this was to retain an expert like Dr. Adams. He could
20 only state that he and perhaps a few other lawyers in Northern Nevada did
21 so. The court denies the claim.

22 (ECF No. 17-19 at 4.)

23 On appeal, the Nevada Supreme Court held as follows:

24 [A]ppellant claims that trial counsel was ineffective for failing to
25 retain and present an expert to refute the findings of the nurse who
26 examined the victim after the sexual assault. Appellant claims that had trial
27 counsel retained an expert, that expert would have testified that there were
28 no injuries to the victim in this case. Appellant failed to demonstrate he
was prejudiced. The district court concluded that the expert's testimony
would not have resulted in a reasonable probability of a different outcome
at trial. Substantial evidence supports the decision of the district court. The
expert conceded that the absence of injury in sexual assault cases is just
as likely as the presence of physical injury. Further, appellant admitted to
having forceful sex with the victim. *Lokken v. State*, Docket No. 49147
(Order of Affirmance, June 4, 2008). Therefore, the district court did not
err in denying this claim.

To the extent that appellant claims that the district court erred by
not taking into consideration a case in front of a different district court that
found trial counsel in the other case ineffective for failing to retain an
expert, appellant fails to demonstrate he is entitled to relief. The facts and
circumstances of the two cases were vastly different and, as stated above,
appellant failed to demonstrate that calling the expert at trial would have
resulted in a reasonable probability of a different outcome. Therefore, the

1 district court did not err by not taking the other case into consideration in
2 its decision.

3 (ECF No. 19-25, at 3.)

4 Here again, the Nevada Supreme Court applied the correct federal law standard.
5 In addition, fair-minded jurists could conclude that the court reached the right decision
6 in determining that Lokken was not deprived of effective assistance of counsel as a
7 result of counsel failing to present an expert witness to refute the testimony of the nurse
8 who examined the victim.

9 Based on the foregoing, the Court denies Ground 1.

10 **B. Ground 2**

11 In Ground 2, petitioner alleges that his constitutional right to due process was
12 violated because the state district court “erred in not granting him a new trial due to
13 conflicting evidence and newly presented evidence” regarding whether sexual contact
14 with the victim was consensual. In support of the claim, Lokken alleges (1) that two
15 witnesses testified at trial that the victim had told them the sex with Lokken was
16 consensual and (2) that three additional witnesses corroborated that testimony at his
17 post-conviction evidentiary hearing.³

18 The two motions for new trial filed by Lokken were both premised primarily on the
19 conclusions of Dr. Adams, not on the evidence cited by Lokken under Ground 2. (ECF
20 Nos. 15-12 and 16-20.) Thus, Lokken appears to be claiming, as he did on direct appeal,
21 that the trial court erred by not granting a new trial *sua sponte*.

22 Nevada law authorizes the state district court to grant a new trial based on its
23 independent evaluation of conflicting evidence. *State v. Purcell*, 887 P.2d 276, 278 (Nev.
24 1994). There is, however, no requirement that the court do so. Moreover, as a
25 constitutional matter, a due process violation does not arise from the presentation of
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27 ³As recounted in this Court’s order deciding respondents’ motion to dismiss,
28 some of the factual allegations in support of this claim are unexhausted. (ECF No. 26.)
Lokken has abandoned those allegations. (ECF No. 27.)

1 conflicting evidence at trial. Instead, a petitioner's right to due process is violated if there
2 is *insufficient* evidence to support the jury verdict. *Jackson v. Virginia*, 443 U.S. 307,
3 316-19 (1979). Under that standard, the court inquires as to "whether, after viewing the
4 evidence in the light most favorable to the prosecution, any rational trier of fact could
5 have found the essential elements of the crime beyond a reasonable doubt." *Jackson*,
6 443 U.S. at 319 (citation omitted). "This familiar standard gives full play to the
7 responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the
8 evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

9 Here, there was sufficient evidence to find Lokken guilty beyond a reasonable
10 doubt under the *Jackson* standard. The victim testified that Lokken had forcefully raped
11 her in his bedroom. (ECF No. 10-4 at 31-70.) In addition, a detective who interviewed
12 Lokken testified at trial. (ECF No. 10-6 at 17-72 and 10-7 at 2-13.) According to that
13 testimony, Lokken initially denied any wrongdoing, then eventually admitted to sexual
14 conduct with the victim, including "forceful" sexual intercourse with her. (*Id.*) The
15 detective further testified that Lokken, who was twenty years old at the time, admitted
16 that he knew the victim was only thirteen. (*Id.* at 67.) Nurse Engel testified that her
17 findings led her to conclude that the injuries were the result of significant force. (ECF
18 No. 10-5 at 22-55.)

19 Based on the foregoing, the Court denies Ground 2.

20 **C. Ground 3**

21 In Ground 3, Lokken alleges that his constitutional right to due process was
22 violated because the prosecutor misrepresented the evidence and disparaged defense
23 witnesses. Specifically, he alleges that the prosecutor misled the jury by making
24 unsubstantiated accusations suggesting that Lokken's friends harassed the victim prior
25 to trial and that his mother always allowed him to have underage persons in his bedroom
26 without parental supervision. He also cites to a comment wherein the prosecutor
27 referred to his "trash friends."

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1 In ruling upon Lokken's direct appeal, the Nevada Supreme Court held as follows:

2 Lokken claims that the prosecutor committed misconduct by
3 misstating the evidence and unfairly disparaging defense witnesses.
4 Lokken points to the prosecutor's statement during closing argument that
5 "[y]ou've heard that [the victim] and her family were harassed by his
6 friends. She also had to undergo public humiliation as rumors circulated
7 about her." Lokken also references the prosecutor's description of his
8 home as "the house where the defendant has underaged kids in his
9 bedroom without parental supervision apparently all the time." Lokken also
10 argues that the prosecutor's description of defense witnesses as his "trash
11 friends" was unfairly disparaging.

12 Defense counsel did not object to any of these statements. We
13 therefore review these comments for plain error. [FN9: NRS 178.602.]
14 Under plain error review, we will find prosecutorial misconduct if the error
15 either: "(1) had a prejudicial impact on the verdict when viewed in context
16 of the trial as a whole, or (2) seriously affects the integrity or public
17 reputation of the judicial proceedings." [FN10: *Rose v. State*, 123 Nev. 24,
18 ___, 163 P.3d 408, 418 (2007).] The test for determining whether
19 prosecutorial misconduct deprived a defendant of a fair trial is "whether
20 the prosecutor's statements so infected the proceedings with unfairness
21 as to make the results a denial of due process." [FN11: *Rudin v. State*,
22 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004).] A prosecutor may not
23 argue facts or inferences not supported by the evidence, but is free to
24 "argue inferences from the evidence and offer conclusions on contested
25 issues." [FN12: *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 58 (2005)
26 (*quoting Jones v. State*, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997)).] We
27 will address each of the allegedly improper statements in order.

28 Regarding the statement that Lokken's friends harassed the victim
and her family, the victim's mother testified that Lokken and his friend
Jacquelyn made phone calls to the victim's residence on separate
occasions. The victim testified that she received "angry calls" and that
Lokken called her a few days after the alleged sexual assault and taunted
her with the fact that he had not worn a condom. We conclude that the
prosecutor's statement was permissible based on the evidence presented
at trial.

The State presented testimony that the neighbors heard about the
victim's sexual assault allegations and that they talked about it both with
each other and with Lokken and his family. Three people testified that they
were friends with the victim until about the time the victim brought her rape
allegation against Lokken. Two of them admitted they were now good
friends with Lokken, and the other stated she and the victim were now
"enemies." The victim was only 13 years old. There is sufficient evidence
to permit an inference that rumors were circulated about the victim and
she suffered "public humiliation."

The prosecutor's reference to the lack of supervision at Lokken's
home was based on evidence presented at trial. In particular, Lokken's
mother testified that she permitted her son to go into his bedroom with
underage friends because she had no reason to question anyone that
came into her house. She stated that her son had "quite a few friends" that
were underage. She stated that it did not bother her that her son went into

1 his room and closed the door with someone who was underage because
 2 it was "nothing unusual." The prosecution's description of defendant's
 3 "trash friends" was not specifically directed at defense witnesses, and
 must be considered in context. [FN13: Rudin, 120 Nev. at 136-37, 86 P.3d
 at 582.] The State used the term during closing argument:

4 If she's so into him, if this is so wonderful and he's so
 5 nice and they're so happy together and this is a wonderful
 6 moment in her young life and his life, if she's so into him,
 then ladies and gentlemen, why isn't she walking with him to
 the store? Why is she hanging around with his trash friends?

7 We have held that it is improper to disparage defense counsel,
 8 defense tactics, or the defendant himself. [FN14: See Butler v. State, 120
 Nev. 879, 898, 102 P.3d 71, 84 (2004).] However, unflattering
 9 characterizations of a defendant will not provoke a reversal when such
 descriptions are supported by the evidence. [FN15: Miller v. State, 121
 10 Nev. 92, 100, 110 P.3d 53, 59 (2005) (citing U.S. v. Tisdale, 817 F.2d
 11 1552, 1555 (11th Cir. 1987)).] We conclude that the same standard applies
 where, as here, the prosecutor disparaged defense witnesses. The above
 12 description of Lokken's friends, particularly after several of them had
 testified at trial, was disparaging to the defendant and defense witnesses,
 and the State admits its error. But the State maintains that the comment
 13 "accurately described the witnesses' demeanor and appearance." The
 record does not include descriptions of the witnesses' appearance or
 14 demeanor, and therefore we are unable to determine the accuracy of the
 State's contention. However, the jurors were able to view testimony and
 15 determine for themselves whether the description was valid. We conclude
 that the prosecutor's comments in this regard did not rise to the level of
 16 plain error.

17 (ECF No. 11-8 at 6-9.)

18 To obtain habeas relief based on a prosecutor's remarks, a petitioner must
 19 demonstrate that the remarks "so infected the trial with unfairness as to make the
 20 resulting conviction a denial of due process." *Davis v. Woodford*, 384 F.3d 628, 644 (9th
 21 Cir. 2004) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). In addition, "a
 22 criminal conviction is not to be lightly overturned on the basis of a prosecutor's
 23 comments standing alone, for the statements or conduct must be viewed in context; only
 24 by so doing can it be determined whether the prosecutor's conduct affected the fairness
 25 of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985).

26 Because the Nevada Supreme Court applied a standard that was consistent with
 27 *Darden*, its decision was not contrary to federal law for the purposes of § 2254(d). See
 28 *Early v. Packer*, 537 U.S. 3, 8 (2002) (holding that state court is not required to cite

1 federal case law, or even be aware of federal cases, to avoid its decision being “contrary
2 to” Supreme Court precedent). In addition, the Nevada Supreme Court's decision was
3 not an unreasonable application of the federal law standard. Thus, this Court must defer
4 to it under AEDPA, and deny habeas relief on this claim.

5 **D. Ground 4**

6 In Ground 4, Lokken claims he was deprived of effective assistance of counsel,
7 in violation of his constitutional rights, because counsel failed to advise him to testify at
8 trial. In support of this claim, Lokken alleges that his only viable defense was that the
9 sexual activity between him and the alleged victim was consensual, making him guilty
10 of statutory sexual seduction rather than sexual assault. According to Lokken, it was a
11 “he said/she said” case, which made it necessary for him to testify so that the jury could
12 weigh his credibility against the alleged victim. Lokken also alleges that he felt pressure
13 not to testify because the trial court cautioned him eleven times about testifying on his
14 own behalf at trial.

15 In Lokken’s post-conviction proceeding, the Nevada Supreme Court held as
16 follows:

17 [A]ppellant claims that trial counsel was ineffective for failing to
18 encourage appellant to testify. The State argues that this claim differs from
19 his claim raised below in his supplemental petition. In his supplemental
20 petition, appellant claimed that trial counsel was ineffective for advising
21 him not to testify and that he waived his right to testify “under duress.”
22 While the claim on appeal is worded differently, it is essentially the same
claim, and therefore, we elect to consider the claim, *cf. Walch v. State*, 112
Nev. 25, 30, 909 P.2d 1184, 1187 (1996) (stating that generally this court
need not address issues raised for the first time on appeal), and we
conclude that appellant failed to demonstrate that counsel was deficient.

23 At the evidentiary hearing, trial counsel testified that he did not
24 advise appellant either way. He merely presented the pros and cons of
25 testifying and left appellant to make the decision. Appellant testified that
26 trial counsel discussed the pros and cons but also claimed that trial
27 counsel told him he would not be able to appeal if he testified because he
28 would be admitting to conduct constituting the crimes charged. Trial
counsel stated he never told appellant he could not appeal if he testified.
After the evidentiary hearing, the district court determined that appellant
failed to demonstrate that trial counsel told him not to testify, appellant
understood it was his choice whether to testify, and appellant chose not
to. Substantial evidence supports the decision of the district court, and
therefore, the district court did not err in denying this claim.

1 (ECF No. 19-25, at 3-4.)

2 Once again, the Nevada Supreme Court applied the correct federal law standard.
3 In addition, fair-minded jurists could conclude that the court reached the right decision
4 in determining that Lokken was not deprived of effective assistance of counsel as a
5 result of counsel failing to advise him to testify at trial.

6 Based on the foregoing, the Court denies Ground 4.

7 **IV. CONCLUSION**

8 For the reasons set forth above, Lokken's petition for habeas relief is denied.

9 *Certificate of Appealability*

10 This is a final order adverse to the petitioner. As such, Rule 11 of the Rules
11 Governing Section 2254 Cases requires this Court to issue or deny a certificate of
12 appealability (COA). Accordingly, the Court has *sua sponte* evaluated the claims within
13 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
14 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

15 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
16 "has made a substantial showing of the denial of a constitutional right." With respect to
17 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
18 would find the district court's assessment of the constitutional claims debatable or
19 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S.
20 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists
21 could debate (1) whether the petition states a valid claim of the denial of a constitutional
22 right and (2) whether the court's procedural ruling was correct. *Id.*


23 Having reviewed its determinations and rulings in adjudicating Lokken's petition,
24 the Court declines to issue a certificate of appealability for its resolution of any
25 procedural issues or any of Lokken's habeas claims.

26 It is therefore ordered that petitioner's petition for writ of habeas corpus (ECF No.
27 4) is denied. The Clerk will enter judgment accordingly.

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1 It is further ordered that a certificate of appealability is denied.

2 DATED THIS 20th day of December 2016.

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5 MIRANDA M. DU
6 UNITED STATES DISTRICT JUDGE
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